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In the Supreme Court of the United States

OCTOBER TERM, 1995

GORDON L. RUSH, JR.,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Was The Trial Court In Error When It Ruled That The Defendant Rush Did Not Have A Constitutional Right To Waive The Jury Over The Government's Objection Notwithstanding The Complexities Of the Factual And Legal Issues Involved, And Did The Appellate Court Err In Upholding That Ruling?

2) Did The Trial Court Err In Failing To Dismiss The Indictment For Violation Of Rule 7(c) Of The Federal Rules Of Criminal Procedure, Requiring That It Be Plain, Concise And Definite, And Did The Appellate Court Err In Upholding That Ruling?

LIST OF PARTIES

The parties to this case are the petitioner, Gordon L. Rush, Jr. and the United States of America as respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gordon L. Rush, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above-entitled proceeding on July 18, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, dated on June 5, 1995 is reprinted in the appendix.

JURISDICTION

The Court of Appeals' judgment was entered on July 18, 1995. Petitioner now invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments VI and XIV to the United States Constitution and Rules 7(c) and 23(a) of the Federal Rules of Criminal Procedure are set forth in the appendix.

STATEMENT OF THE CASE

A. *Statement of Proceedings Below*

On April 23, 1992, the grand jury for the Eastern District of Louisiana returned a fifteen (15) page, twenty-one (21) count indictment charging petitioner Gordon L. Rush, Jr. and two others with various counts of conspiracy, mail fraud, and wire fraud. R. Vol. 1, pp. 266-280. The defendant Rush entered a plea of not guilty on April 30, 1992 and in addition to filing various discovery motions, *Ibid.* 58 - 106, the defendant Rush also filed a motion to waive trial by jury and be tried by the court alone, *Ibid.* 492, *Ibid.* 414, and an alternative motion to strike surplusage, *Ibid.* 421.

Without acknowledging that the defendant Rush was correct in his claim of duplicity the gevernment nevertheless determined to return a superseding indictment on October 1, 1992. R. Vol. II, p. 349. The defendant Rush reurged his motion to dismiss as to the superseding indictment. *Ibid.* 327.

The co-defendant McDermot also filed a motion to waive the right to trial by jury and be tried by the court alone, *Ibid.* 466. The government objected to the jury being waived and the court denied the motion as to both defendants. *Ibid.* 411. The district court denied the defendant Rush's motion to dismiss on the grounds of duplicity, but strongly critized the argumentative manner in which the indictment was drafted. Vol. III, pp. 813-818. In response to those observations by the court the defendant Rush filed a second motion to dismiss for failure of the indictment to comply with Rule 7(c) of the Federal Rules of Criminal Procedure. *Ibid.* 670. The district court in weighing the delays that had already ensued and the fact that the defense had no case law directly on point, denied the motion to dismiss stating that ::...[p]erhaps the future will offer an appropriate opportunity to address the interesting issue presented in this motion." *Ibid.* pp. 668-669.

The government dismissed Counts 2,3,4, and 8 of the superseding indictment, Vol. III, p. 702 and 638. Therefore, the Second Superseding Indictment contained 19 counts *Ibid.* 640-654.

The defendant Kochensparger pleaded guilty to Count 1 of the indictment, Vol. II, p. 441, and the defendant Rush with the co-defendant Peter McDermot proceeded to trial on January 11, 1993. The trial was concluded on January 22, 1993 and both defendants moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure and the court took those motions under submission. Vo. IV, p. 971. Vol. IX, p. 1649. The jury returned a verdict of guilty as to all counts as to both defendants. Vol. IV, p. 971. As the result of the death of the Honorable George Arceneaux, the judge who presided throughout the pre-trial and trial proceedings, the case was transferred to the Honorable Lansing L. Mitchell on April 13, 1993. Vol. IV, p. 949. Because Judge Mitchell had not presided over the trial and did not know what evidence had been presented the defense requested an evidentiary hearing to resolve issues relative to sentencing. Vol. IV, p. 914. The hearing was conducted on June 22, 1993, *Ibid.* p. 912 and additional evidence

was taken on June 24 and 25, 1993. *Ibid.*, pp. 908 and 910. The defendant McDermot filed a motion for new trial based upon Rule 25 of the Federal Rules of Criminal Procedure and the death of Judge Arceneaux, Vol. IV, p. 940 and the defendant Rush filed a motion for verdict of acquittal and an alternative motion for new trial based upon the same ground. Vol. V, p. 1317. Both motions were denied. Vol. IV, p. 940, Vol. V., p. 1248.

The defendants were sentenced on August 18, 1993, and the defendant Rush was committed to the custody of the Attorney General to be imprisoned for a term of 46 months as to each Count 1 through 19 to run concurrently; he was further fined $25,000.00 and upon release from imprisonment to be placed on supervised release for a term of 3 years. Vol. V, p. 1200. On August 24, 1993, defendant Rush timely filed his notice of appeal from both the conviction and sentence. Vol. V, p. 1197. On September 9, 1993, the government filed its notice of appeal regarding the sentence imposed on the Mr. Rush.

The defendant Rush appealed his conviction and sentence and the Fifth Circuit Court of Appeals affirmed the convictions and sentence and remanded the case to the district court to consider the possibility of further enhancement of Mr. Rush's sentence.

B. *Statement of Facts*

The government alleged that there was a scheme to defraud when Presidential Fire and Casualty Insurance Company (Presidential) was first formed in 1985 in that the assets that were supposed to be available for the Insurance Commissioner were supposedly encumbered; that certain federally insured securities, Federal National Mortgage Associations (hereinafter FNMAs) and Government National Mortgage Associations (hereinafter GNMAs), were bogus and that defendant Rush knew that they were bogus when they were used as surplus capital for Presidential; that certain FNMAs and municipal bonds infused into the company by the co-defendant Peter McDermot were bogus and known by the

defendant Rush to be bogus; and that the defendants Rush and McDermot diverted money from Presidential, A & R Capital and other companies owned by Rush for personal use and concealed the diversion of those monies. Vol. 3, pp. 640-645. The government further alleged that the defendent Rush in the operation of A & R Capital and its succesor company Emerald Financial and Mortgage, Inc. (A & R Capital/Emerald) failed to return to customers, who had financed insurance premiums through those companies, unearned premiums to which they were due when Lloyds of Louisiana Insurance Company was placed in liquidation. Vol 3, p. 651, 653.

The FNMAs/GNMAs were infused into the company by a one Ed Robichaux. Robichaux did not in fact own the securities and he was ultimately prosecuted and convicted. *United States v. Robichaux*, 995 F.2d 565 (5th Cir.), *cert. denied*, 114 S. Ct. 322 (1993). The government conceded that at the time the bogus nature of the Robichaux securities was discovered it had no reason to believe that Presidential and Rush were anything other than victims of Robichaux's scheme. Indeed, when the F.B.I. notified Mr. Rush regarding the bogus securities, Mr. Rush immediately notified the Insurance Commissioner and took the securities off Presidential's statement. Tr. 13 However, when Rush was later attempting to sell Presidential to Peter McDermot and some of the same numbered FNMAs were among the securities that McDermot was going to infuse into Presidential, the government found this to be "such a coincidence" as to conclude that the defendant Rush must have been knowledgeable about the bogus nature of all of the securities, *Ibid.*

The government called over 35 witnesses in its case but with the exception of the testimony of Martha Hunt regarding the Lloyds of Louisiana/LIGA refunds, to be discussed *infra*, there was no direct testimony that defendant Rush had knowingly done anything wrong. Most of the government witnesses were devoted to explaning the esoteric nature of FNMAs and GNMAs. Tr. 375-401 (Robert Grady); 402-411 (Jacques Hettena); 449-479 (Margaret McGrath); 482-493

(John Celifarco); 493-499 (Susan Needham); 493-499 (Robert Quirk); 499-502 (James Quale); 502-514 (Dennis Gillespie); 514-517 (John Dodson); 528-531 Frederick O'Neill); 531-534 (Sandy Smith); 534-535 (Lynette Hamilton); 535-538 (Mark Howard). While the totality of their testimony clearly established that Mr. McDermot did not own the FNMAs he had listed on his financial statement, it also established how convoluted the entire process was and how impossible it would be for Mr. Rush, or even his attorneys, to check on the ownership of any listed FNMA securities. In fact, it turned out that the securities could *not* by transferred by assignment under the Uniform Commercial Code as the auditors for the Louisiana Insurance Commission, Tr. 332-373 and the accounting firm of Deloitte Touche Tr. 539-615 had told Mr. Rush could be done. While the government called as witnesses the former attorneys who had worked for Presidential, as well as the statutory accountant who prepared the statements for Presidential, these witnesses supported the defendant's position. Ronald Hagan, Tr. 218-219, 221-223, 239, 244, 246-248, 249-250, 252-254, 269-270; Jennifer Matte, Tr. 314-317,319-320, 322; Mr. Walter Mann, Tr. 626-628, 644, 649-650, 659-657, 659-664, 666-669, 671-672, 683-685. Mr. Hagan and Ms. Matte explained the extensive efforts which were made by them and Mr. Rush to make sure that the securities that were being infused into the company by both Mr. Robichaux and Mr. McDermot were genuine. Mr. Mann confirmed the overall integrity of the operations at Presidential and the efforts which everyone made to see that all of the information contained on the statements made to the Insurance Commissioner were accurate.

The government called Larry Coleman, who was a certified financial examiner and who worked for the Louisiana Department of Insurance. He explained that he had been sent to check on the FNMA securities transferred from Robichaux to G.L.R. and ultimately into Presidential. He found that the transfers were valid and the manner in which they were done would have made Presidential a holder in due course under the Uniform Commercial Code. Tr. 352, 355, 359-360.

The government's next witness was Mr. Ken Dwyer

from the accounting firm of Deloitte Touche. Notwithstanding the approval by Mr. Coleman of the assignment of the securities, the Insurance Commissioner determined to send Deloitte Touche in to check on what had transpired. Mr. Dwyer found everything in order and believed that the transfers were valid under the Uniform Commercial Code and had Robichaux in fact owned the securities they would have accomplished exactly what Mr. Rush and the Insurance Commissioner had envisioned. He conceded that he later learned that he was incorrect in his understanding of how FNMAs had to be transferred and as of the time he knew that his advice to Mr. Rush and the Commissioner was incorrect. Tr. 548-549, 568-573, 577-581, 592. Mr. Dwyer testified that to check on the validity of the transfer, he traced the securities back from Robichaux to Mr. Kochensparger. Mr. Kochensparger was working in collusion with Mr. Robichaux and he sent a letter to Mr. Dwyer confirming that he was holding the FNMAs. Tr. 556-558. Mr. Kochensparger was indicted in the instant case and pleaded guilty for his participation with Robichaux. Vol. 2, p. 441.

Mr. Dwyer admitted that he had information in his file regarding the persons that he could contact to check on the proper method of transferring FNMAs. He failed to follow up by making those contacts and he conceded that had he done so he would have learned that a mere broker such as Mr. Kochensparger at Parson's Securities could not possibily have been a custodian of the FNMAs because only specially licensed governmental securities brokers could hold them. Tr. 577, 581. While Mr. Dwyer first claimed that it was Mr. Rush who put him in touch with Kochensparger he later admitted that in his conversation with the F.B.I. he simply assumed that Rush had done it because he was the "only person possible" that could have given him the information. Tr. 566, 567. However, Mr. Robichaux, himself, was working out of Presidential's offices, Tr. 316, and he was a very "possible" source.

The government called F.B.I. Special Agent Stephen

Hooker. Agent Hooker testified that he had gone through various of the records of Presidential and related companies of Gordon Rush and determined that certain funds had been taken out of the company for "personal" use by Gordon Rush. Tr. 697-748. Numerous items were identified ranging from condominiums to carpet cleaning services. Tr. 697-748. However, on cross examination he acknowledged that he had included a number of items as being "personal" even through they were owned by corporate entities. He stated that he justified doing this because of the fact that Gordon Rush owned all of the corporate entities in question. Tr. 748-749. The district judge called him down for such a completely unjustified conclusion and ordered the jury to disregard that remark. Tr. 749. When questioned on a number of specific expenditures which he had previously identified, Agent Hooker was not able to state whether they were business expenses or personal expenses. Tr. 750-752. He acknowledged that all of Mr. Rush's companies were operating out of the same location and he was able to determine what portions of the building or materials were being used by which different entities. Tr. 752-753.

Regarding the supposedly encumbbered Certificate of Deposit, the government called two witneses, Mr. Eugene Harris and Mr. Kermit Mogilles. Mr. Harris had no information regarding the loan, Tr. 118-122, and his only purpose was to produce the various bank documents that related to the loan. Tr. 91-122. Mr. Kermit Mogilles worked at Investors Bank during the time period in question and part of job was to review loans and make risk asessments. Tr. 123-124. He testified that he had questions about the adequacy of the security backing up the $1.4 million dollar loan, but when pressed on specifies he acknowledged that he did not handle the loan and did not do any independent checking on the worth of the borrower or the receivables in the company which stock had been pledged behind the loan, i.e. A & R Capital. Tr. 123-128. In fact he acknowledged that the bank had $1,578,475.00 in *excess* certificates which could have been used to further collateralize the loan if indeed the receivables due to A & R Capital together with Gordon Rush's personal

wealth were not sufficient. Tr. 132-137.

Mr. Harris and Mr. Mogilles identified various loan documents including a letter from the bank president to the bank attorney and the bank attorney's answer. This correspondence disclosed that the bank attorney was specifically asked for an opinion as to whether a pledge of the stock as between Gordon Rush and the bank would be contrary to a letter of safe keeping to the Insurance Commissioner representing that the stock was unencumbered. The letter from the bank attorney explained that the procedure was permissible and it would protect the bank as between it and Mr. rush, but as between it and the Insurance Commissioner the commissioner would "prime" the bank. Govt. Exh.'s. 203-223.

The government called as a witness Ms. Martha Hunt. She testified that she had worked for various of the Gordon Rush companies and while she was paid by Affiliated Employees, most of the work she did was for A & R Capital which later became Emerald Finance and Mortgage (A & R Capital/Emerald). That was the Rush company that did premium financing. It was her job to handle cancellation of policies. Tr. 789-791.

In September of 1989 when the F.B.I. conducted a search warrant at the offices of Presidential, Emerald, Affiliated, etc. they found a box containing a number of checks made out to various borrowers of A & R Capital/Emerald. Tr. 793. Ms. Hunt explained that when Lloyds of Louisiana Insurance Company went under all of the policies were canceled. Since A & R Capital had financed many of those premiums for Lloyds of Louisiana the borrowers were entitled to refunds. When LIGA sent to A & R Capital a number of returned premiums on Lloyds policies A & R Capital in turn owed a portion of those amounts to the borrowers.

Ms. Hunt stated that she and another employee by the name of Tammy Weller caused the refund checks to be made out to the borrowers, but they were never actually sent to the borrowers because Mr. Rush instructed her not to mail them out unles the borrower actually called up requesting

the refund. Tr. 795-799. Ms. Hunt then identified checks that were due to individual borrowers, specifically Kenneth Aguillard, Henry Griffin, Vanessa Jones, Christine McGee, Anne Young, Richard Paine, and Kirk Canova. Tr. 799-807.

Although Lloyds of Louisiana went under in April of 1986 the refunds were not sent by LIGA to A & R Capital/Emerald until two years later in 1988. Tr. 798. There was no testimony that the mails were ever used in furtherance of the alleged scheme to defraud. In fact, it was the government's theory of the fraud that the defendant Rush refused to allow the refunds to be mailed to the borrowers. Tr. 789-822.

Ms. Hunt acknowledged that when Lloyds of Louisiana first went under in 1986 that A & R Capital had been hired by LIGA to attempt to locate the various policy holders and had sent out a number of letters attempting to accomplish that goal. Tr. 819. Regarding the instructions that she supposedly got from Mr. Rush she testified that there was never any discussion involved, but simply a direction from him that no refunds be sent out unless the customer first called requesting the money. Tr. 819-821. There was absolutely no testimony that in any way referred to the co-dependant Peter McDermot although it was alleged that he was supposedly part of the scheme. The government then called the previously named borrowers who testified that their refunds were not sent to them and they would have liked to have had the money.

Gordon Rush testified in his own defense. Regarding the $1.4 million dollar loan that the government claime was encumbered Mr. Rush pointed out that he had more than adequate security for that loan. He was the sole owner of A & R Capital and he had over $2.5 million dollars in receivables and had previously borrowed from the same bank $1.5 million dollards against those receivables. In addition to the receivables A & R Capital also had over $60,000.00 worth of equipment and over $200,000.00 net worth of property. He further was protecting the bank by taking out a life insurance policy in the amount of $1.5 million dollars which

was payable to the bank. Tr. 884-889. The bank president, Mr. Russell Haas, explained to him that they would like additional security in the form of a pledge of the certificate of deposit. Mr. Rush had no problem with pledging the certificate as between him and the bank so long as it remained free and clear as to the Commissioner of Insurance, because that after all was the purpose for which he was borrowing the money. It was then that Mr. Haas wrote to the bank's attorney and got the opinion that what they had envisioned doing was feasible and would only encumber the C.D. as between the bank and Mr. Rush. As between the bank and the Commissioner of Insurance he would "prime" the bank. Those letters were introduced into evidence. Govt. Exh's 201, 202, 203, 207.

Mr. Russell Haas, the bank president was called as a defense witness as was Mr. Harry Stumpf, the bank's attorney. They both represented that the loan transaction was exactly as Mr. Rush had described it and that in fact the $1.5 million dollar C.D. was *not* encumbered as to the Insurance Commissioner and that the allegation to the contrary on page 3 of the indictment was not true. Tr. 888, 891; 1191-1214; 1261-1296. Mr. Rush further pointed out that the entire transaction, including the letter from the bank's attorney, was explained to the Insurance Commissioner and he was fully appraised of what was taking place. Tr. 892. The letter of safekeeping was sent to the Insurance Commissioner by Investors Bank, Exh. 207, and the loan was completely paid off in the early part of 1986. Tr. 894.

Regarding the allegation that he had supposedly infused false FNMA securities into Presidential through Ed Robichaux to hide the insolvency of the company, he pointed out that his deal with Robichaux did not even begin until 1989 and the company had been insolvent since the beginning of 1987. He explained that when he first went into business in 1985 President wrote automobile insurance which was a risky type of policy. Accordingly, he reinsured 100% of the policies he wrote. When the reinsurer, Insurance Exchange of America in Florida went under Presidential was insolvent. That was explained to the Insurance Commissioner

who allowed Presidential to stay in business as long as it could stay current in paying its claims. Tr. 898-901.

To work Presidential out of its problems Mr. Rush determined to move to a more profitable line of insurance and to infuse monies form his other companies to keep Presidential going. He did both of these things. He went to the Louisiana legislature and got it to approve a low risk "aggregate" policy that would replace the workmen's compensation requirement for the "mom and pop" operations. There was a great demand for this type of insurance and it proved to be very profitable. He also infused over $1.8 million dollars into Presidential from other companies of his. Tr. 905-918.

He knew that it would only be a matter of time before the larger companies saw how successful the "aggregate" line of insurance was and would come in and take over the market. It is for that reason be was looking for an influx of capital so that he could go public and write insurance on a national level. He therefore worked out the agreement with Ed Robichaux to accomplish the infusion of approximately $12 million dollars of FNMA's. He explained that with the ability to write policies on a ratio of four to one - i.e. $4.00 of insurance for every $1.00 of surplus capital - the arrangement with Robichaux was favorable to both of them. FNMA's were an amortizing asset and he could build up surplus in Presidential and at the same time pay Robichaux a greater return on the securities than the amount they earned in interest. If Ed Robichaux had actually owned the securities it would have been an advantageous arrangement for both of them. Tr. 918-944. The entire transaction was divulged to the Commissioner of Insurance who sent in both Mr. Coleman and Mr. Dwyer. When they both approved the ownership and method of transfer of the securities he had no reason to doubt the legitimacy of what Mr. Robichaux had represented. Tr. 928-937.

When he was ultimately advised by the F.B.I. that Robichaux did not in fact own the securities, Mr. Rush immediately took them off his financial statement and notified the Insurance Commissioner. Tr. 952. After the problems

with Mr. Robichaux it became clear to Mr. Rush that he was in over his head and it was in his best interest to sell Presidential. He was put in touch with Mr. McDermot by a broker and he did everything in his power to check out Mr. McDermot to make sure that he was legitimate. He hired a private investigator to check on Mr. McDermot's background and he sent Presidential's attorney, Mr. Ron Hagan out to meet with him and review his operations. Mr. McDermot appeared to be legitimate and capable of buying Presidential as he had proposed to do. Mr. Rush even went to Las Vagas himself to meet with Mr. McDermot and personally check him out. It was at that time that Mr. Rush discovered that some of the Cusip numbers on the FNMAs which McDermot proposed to invest in Presidential were the same numbers that Robichaux had had on some of the FNMAs that it turned out he did not own. This was the "coincidence" that led to the government indicting Mr. Rush.

However, at the time this was discovered Mr. McDermot had a legitimate explanation as to how Mr. Robichaux could have gotten access to the numbers of his FNMA securities. He further was able to produce his income tax return and show where he had paid income taxes on the FNMAs in question. Most importantly Mr. Rush pointed out to Mr. McDermot that the F.B.I. was actively investigating insurance companies in Louisiana and Mr. Robichaux had been indicted on those very securities. He could not believe that under those circumstances Mr. McDermot would have gone forward with the transaction if in fact he did not own the FNMAs. Of course, it was also pointed out to Mr. McDermot that the securities would have to be reviewed and approved by Louisiana Department of Insurance. Mr. McDermot assured him that there were no problems with the securities and further assured him that in the event any question came up regarding the FNMAs there would by a right to substitute other securities. Tr. 947-965.

Additionally, Mr. Rush hired an outside attorney, Mr. Joseph McMahon, who was formerly an Assistant United States Attorney and Chief of the Criminal Division in the

Eastern District of Louisiana. He asked Mr. McMahon to check on the ownership of the questioned FNMAs. Like Ms. Matte, Mr. Coleman, and Mr. Dwyer, Mr. McMahon discovered that while you could verify the existence of the FNMAs by the Cusip numbers you could not ascertain the ownership of the securities. Nevertheless he personally met with Mr. McDermot and confronted him with the realities of the F.B.I. investigation of insurance companies in Louisiana and how foolhardy it would be for Mr. McDermot to press forward attempting to buy Presidential with any securities which he did not legitimately own. He also was assured by Mr. McDermot regarding the ownership of the securities and the legitimacy of his attempts to buy Presidential. Tr. 965-966. Mr. McMahon testified as a defense witness and confirmed Mr. Rush's testimony. Tr. 1228-1256.

Regarding the transaction with Insurance Commissioner Douglas Green, Mr. Rush pointed out that this was an arms length transaction and he was making a loan that was secured by good collateral. Subsequent testimony by Mr. Rush's bookkeeper, Ms. Deborah Munch and the company's attorney, Mr. Ron Hagan disclosed that he had told them to handle the loan in a completely proper and businesslike manner. While it is true that they had slipped up and failed to get the mortgage recorded so as to protect the loan, they testified that that was in no way the fault of Mr. Rush. He had told them to handle it properly. Tr. 1169-1172.

Regarding the LIGA refunds about which Ms Hunt claimed Mr. Rush had told her not to mail out unless the borrower called up asking for the money, he explained that that simply was not correct. While he did not believe that Ms. Hunt was knowingly testifying falsely, he did believe she had misunderstood his instructions. He explained that when Lloyds of Louisiana had originally gone under in 1986, LIGA had hired his company to attempt to find the approximate 7500 policyholders who were due refunds. The ones that they could find were of course paid. When LIGA unilaterally sent the remaining refunds to A & R Capital/Emerald two years later in 1988 he felt that there was no chance of locating

the policyholders then that they could not locate two years earlier when they had tried. He instructed Ms. Hunt that *if* a policyholder called seeking a refund she should notify him. He explained that there were return brokerage commissions that were owed to LIGA and he would have had to have made those determinations before sending out the refunds. Mr. Rush was able to show the various errors in the checks which Ms. Hunt had prepared demonstrating why he would have had to have reviewed them. Tr. 998-1003.

The defense called as additional witnesses Ms. Marilyn Stringer, Diana Lee Bullock, and Lynne Paulina. They had worked for Mr. Rush's various companies for a number of years and it was their responsibility to generate the computer information that would supply data to the statutory accountant Mr. Walter Mann, and would generate information regarding refunds that were due. They all testified that throughout the years they had worked for Mr. Rush they had always produced accurate information and caused refunds to be made to any policy holders or borrowers to whom they were due. Mr. Rush never instructed them or ever even suffested to them that they should generate any information that was not correct or fail to make any refunds that were due. Tr. 1301-1315.

REASONS FOR GRANTING THE WRIT

I. ARGUMENT

A. *Introduction*

Thirty years ago this Court decided in the case of *Singer v. United States,* 380 U.S. 24, 85 S.Ct. 783 (1965) that jury trials were the presumed method for disposing of criminal cases in federal courts and a defendant did not have an absolute right to waive the jury. However, the Court left opened the possibility that in the proper circumstances a jury trial could be waived by a defendant even in the face of an objection by the government.

> Petitioner argues that there might arise situations where 'passion, prejudice, . . . public feelings' or some other factor may render impossible or unlikely an im-

> partial trial by jury. However, since petitioner gave no reason for wanting to forego jury trial other than to save time, this is not such a case and petitioner does not claim that it is. *Ibis.* at 37-38.

In the years that have passed since the *Singer* decision the government has brought ever increasingly complex "white collar" prosecutions. In this writ application the defense asks the Court to determine the constitutional issue of whether a criminal case can be so factually and legally complex as to be beyond the capabilities of a jury, and hence the defendant has a right to waive the jury lest he be denied his right to due process and a fair trial.

Petitioner additionally raises a separate but related issue regarding the interpretation of Rule 7(c) of the Federal Rules of Criminal Procedure. That rule requires that an indictment contain a "plain, concise, and definite written atatement" of the charges against the defendant. While this Court has had many occasions to examine the constitutional dimensions of a criminal indictment it has never considered the much more narrow restrictions imposed by Rule 7(c). Also as a part of the phenomenon of white collar prosecutions there has developed over the last few decades the lengthy complex indictment which the district court in this case described as being burdened with argument and editorial comments. These prolix argumentative documents are being sent with the jurors when they go to deliberate. The defense will demonstrate that these type of indictments are in clear violation of Rule 7(c) and the practice of using them should be examined by this Court.

B. ***Was The Trial Court In Error When It Ruled That The Defendant Rush Did Not Have A Constitutional Right To Waive The Jury Over The Government's Objection Notwithstanding The Complexities Of the Factual And Legal Issues Involved, And Did The Appellate Court Err In Upholding That Ruling?***

The defense acknowledges that jury trials are the presumed method of determining guilt or innocence in federal criminal prosecutions. Under ordinary circumstances the defendant may only waive a jury trial with the consent of the government. Fed.R.Crim.P. 23(a). Further, the defense recognizes that simply because a case presents complex legal and/or factual issues does not constitute a *per se* constitutional right for the defendant to waive a jury trial. Rather, the issue presented for the Court's consideration is whether there can ever be a situation in which the factual and legal issues to be determined are so complex, convoluted, and esoteric that they would simply be beyond the ability of lay jurors to comprehend. If so, would it not be a violation of the defendant's Sixth Amendment right to a fair trial to deny him the choice of waiving a jury trial and be tried by the judge alone? If the first two inquiries are answered in the affirmative, then it must be determined whether those extreme circumstances were extant in the present case so that the defendant was denied his right to a fair trial when the district court refused to allow the jury waiver over the government's objection.

This Court can see that the Fifth Circuit Court of Appeals side-stepped the issue when the panel simply chose to give what the defense suggests is an artificially narrow view of the language in the *Singer* decision. The court of appeals stated:

> This language [from the *Singer* decision] makes clear that the Court specifically reserved the question of whether a jury trial could amount to a denial of a defendant's right to an *impartial* trial. The Court's emphasis on impartiality conforms with its definition of the criminal defendant's right: 'A defendant's only constitutional right concerning the method of trial is to an *impartial* trial by jury.' *Id.* at 36, 85 S.Ct. at 790 (Emphasis added).
>
> Rush does not challenge the impartiality of his trial. Rather, he argues only that a jury was incapable of understanding the issues in his case. As Rush and McDermot have not alleged a violation of their due pro-

cess required a bench trial in this case.

United States v. Rush, 5th Cir. Opinion No. 93-3603, pp. 7-8. (Emphasis the Court's.)

While it is true that the concept of impartiality can relate to issues such as bias and prejudice it is not so limited. Indeed *Webster's New World Dictionary*, 2d.Ed., discloses that the term "fair" is a synonym for "impartial". In fact, if this Court had wanted to limit its holding to jurors who were simply biased it would have had no reason to have added the words "or some other factor" because "passion, prejudice, . . . public feelings" had already been specifically mentioned in the same sentence. It is obvious that the Court was concerned about any other factor that might possibly impact a jury's ability to be fair. It is after all a fair trial that is guaranteed by the Constitution. It is foolish to suggest that this Court would allow an unfair trial by jury as long as the unfairness did not emanate from either passion, prejudice or public feelings. Stated another way, if the jury was "incapable of understanding the issues" the defendant did not receive a fair/impartial trial.

In fact, the defense was able to cite two reported decisions where jury trials were waived over the objection of the government for the exact reasons urged by petitioner in the instant case. For example, in the case of *United States v. Panteleakis*, 422 F.Supp. 247 (D.R.I. 1976) the court while noting that simply because a case was complicated and therefore might not be "... correctly understood by a jury is not, in and of itself, sufficient reason to circumvent a jury trial. . ." nevertheless granted the motion to waive the jury because of a number of overlapping issues, the totality of which prevented the defendants from getting a fair trial by a jury.

> The court feels that this is the kind of case where "the practical and human limitations of [a] jury . . . cannot be ingnored," because of the context within which the evidence must be presented. This case indeed presents that "other factor . . . render[ing] unlikely an impartial

trial by jury". *Ibid.* at 249-250.

The *Penteleakis* case, like the present case, was a multi-defendant, multi-count indictment alleging fraud. It also was a "document case" in which many exhibits would have to be introduced into evidence .

Another case where the court ruled that a jury had to be waived over the objection of the government was *United States v. Braunstein*, 471 F.Supp. 1 (D.N.J. 1979). In that case the issue was Medicaid fraud and the court noted:

> The difference between Medicare and Medicaid means that the trial here will involve state law, as well as federal law, thus adding another layer of complicated and different accounting rules. * * * Rulings on evidence, with five separate defendants, would carry heavy risk that the jury would hold against one defendant evidence admissible only as to another. Taken in light of all the circumstances, each defendant would be most unlikely to have fair assuarnce that a jury could consider each charge against that defendant independently of the verdict in respect to other charges or against other defendants. * * * The risk of prejudice to a fair trial is extremely high and compelling. *Ibid.* at 13-14.

While the defense recognizes that the above cited cases are district court decisions that were not binding as precedent they nevertheless gave clear and compelling reasons and they were both based upon the "other factor" language left open by this Court in the *Singer* decision.

Again, the parallels to the present case are strong. It is the state laws which regulate the inusrance industry. Not only did those laws have to be superimposed on the federal mail fraud statute, there was the additional complexity regarding the nature of the securities in question. The indictment alleged that there were FNMAs and GNMAs that were shown as surplus capital on the financial statements, but were not in fact "owned"by the defendant. That issue brought into play not only applicable federal and state laws and

regulations, but also issues regarding what were accepted practices within the insurance industry, accounting principles, statutory accounting, the Uniform Commercial Code, and securities law. The totality of those issues was simply beyond the ability of the jury to understand.

As our society becomes more complex and the actions of citizens are judged in the context of a panoply of sophisticated and interrelated laws, rules, and regulations, there reaches a point at which it must be recognized that lay persons no matter how well-intentional are simply incapable of ascertaining whether a given defendant's conduct comported with the applicable standards. See Generally, Kurland, *Providing a Federal Criminal Defendant With A Unilateral Right To A Bench Trial: A Renewed Call To Amend Federal Rule Of Criminal Procedure 23(A),* 26 U.C. Davis L. Rev. 309 (1993). That being true it must necessarily follow that there is a constitutional fair trial/due process right to be tried by the court alone under certain extreme and limited circumstances. While there can be no bright line that clearly delineates when such a waiver must be allowed there can be little doubt but that if the right exists the factual and legal issues inherent in the present case mandate that the defendant should have been afforded a judge trial. If one were to sit down and make up a hypothetical fact scenario that would constitutionally qualify for a bench trial it would be difficult to exceed the complexity of this case.

The complex nature of the indictment foreshadowed what was to take place at the time of trial. The first two pages of the indictment, in paragraphs A(1-6) identify 12 different companies. The government's list of evidence discloed that it intended to produce numerous documents relative to each of these entities. A(7) identified the Louisiana Insurance Guaranty Association which brought before the fact finder the issue of its legal responsibilities and operating policies. A(8) identified the accounting firm of Touche, Ross and the fact finder had to understand the functions and responsibilities of independent auditors.

Paragraph A(10) identified the Federal National Mor-

tgage Association (FNMA). These security devices are regulated by a combination of both federal and state law. The heart of the government's case was that these security devices were not "owned" by the defendant Rush and/or his corporations. The question of whether FNMAs need by owned, or whether they can be assigned, could only be determined by an analysis of federal law, state law, the Uniform Commercial Code and accepted insurance practices. A(11) identified Government National Mortgage Association (GNMA) securities and the issues inherent in these security devices were similar to those described above regarding the FNMAs, but just different enough to add another layer of confusion.

Paragraph B(1-3) raised the issue of whether the financial statement of Presidential disclosed a certificate of deposit as being free of any incumbrance, and if so, whether that representation was true. Intertwined with that issue was whether there were any encumbrances on the certificate which raised further questions of security and banking laws and regulations. Overlapping both of those issues was the question of whether or not the letter sent to the Louisiana Commissioner of Insurance in fact contained any misrepresentations. That presented the additional questions of the legal responsibilities of the Louisiana Office of Insurance Commissioner and fiduciary obligations of banking officers.

Paragraph B(1-4) alleged a fraudulent "paper transaction" of FNMAs. The indictment claimed that Robichaux - an unindicted co-conspirator - conspired with Rush to show a capital surplus of FNMAs that were in fact not to transfer. Robichaux had already been found guilty for his activities in that regard and the issue in this case was whether the defendant Rush was a knowing participant in what Robichaux did. The government did not call Robichaux as a witness and therefore the hearsay problems inherent the evaluating the activities of an unindicted co-conspirator were before the jury.

C-Count 9(A)(1) alleged as an overt act that defendant Rush "caused" an officer of Investors Bank to mail a letter

to the Louisiana Commissioner of Insurance verifying the existence of a 1.4 million dollar certificate of deposit which was unencumbered when the officer of the bank "knew" that the CD was in fact security for another loan. In response to a bill of particulars the government stated that the banker was an unindicted co-conspirator and hence raised all of the evidentiary problems inherent in that status.

C-Count 9(A)(3) alleged false entries on financial statements. Evaluating a financial statement by an insurance company prepared under statutory accounting principles designed for submission to insurance commissioners was beyond the acumen of lay jurors.

C-Count 10(A)(3) alleged as an overt act that a statement sent to the Texas State Board of Insurance failed to properly identify the distinction between two corporate entities. The status of closely held corporations and the "distinction" between them for purposes of insurance commissions was not a matter that court be properly evaluated by lay persons.

C-Count 11 (A)(4) alleged that defendants Rush and McDermot continued to issue insurance policies when they knew that Presidential was "financially impaired". To determine whether an insurance company is financially imparied required not just the ability to read a complex statutory accounting financial statement, but also to evaluate the concept of "incurred but not reported" insurance claims against the company. This was another issue far beyond the ability of untrained lay persons.

Any one of the above described issues could possibly be understood and handled by a jury if enough testimony, including that of experts, was given. However, the totality of all of the legal and factual issues was simply more than a jury of lay persons was capable of understanding. Accordingly, the district court should have granted the defendant Rush's motion to waive the jury even if there was an objection by the government.

The actual presentation of the evidence substantiated

the difficulities which the defense had predicted in moving to waive the jury. The defense recognizes that in evaluating writ applications this Court does not have the time or resources to read the entire transcript of a trial that took two weeks, but it does request that the Court at least review limited portions of the transcript which were made part of the record excerpts in the appellate court and are attached here as part of the appendix. When it is seen how convoluted and legally esoteric the testimony was on issues such as securities trnasactions, FNMA and GNMA assignments, Uniform Commercial Code transfers, etc. it will quickly be seen that these issues were simply beyond the pale of a lay person to comprehend.

If there be any doubt regarding what the defense is suggesting the Court need look no further than the comments of the district court judge who was required to review portions of the transcript of the trial after the death of the trial judge. In response to the government's contention that the case was not really that complicated the district court stated: "I hereby make an affirmative finding that this is, in fact, *complicated* and I find it hard to believe that any one thoroughly familiar with it could seriously make any representations to the contrary. Vol. 5, pp. 1209-1210. (Emphasis the court's.)

The defense stresses that it is not simply a question of complexity *vel non*. Quite often fraud can take place in the context of a business setting in which the complexities are beyond the acumen of the average juror, but those complexities are unrelated to the fraud which is alleged. Not so in the present case. The defendant maintained that he was not a knowing participant in the conduct of Robichaux and McDermot, and to the contrary was able to be victimized by the very intricacies of which he now complains. However, the jury did not have the ability to properly analyze that defense.

For example, when the defendant stated that he thought assets had been validly transferred into his company by means of a Uniform Commercial Code assignment, and

the government experts testified that such assignments were not permissible and would have had to have been accomplished on Treasury forms, how was a jury to determine whether his position was reasonable? What is a UCC-1 assignment How does it work? What is a holder in due course? Was it reasonable for the defendant to have first transferred the securities into GLR, Inc. so that the subsequent transfer to Presidential protected that company as a holder in due course? Was the "side agreement" between Robichaux and GLR, Inc. simply a security device that was legitimately designed to make Presidential a holder in due course, or did it carry with it all of the sinister connotations suggested by the government? These are questions which could easily be understood by a judge, but were impossible for a jury to fathom.

Lest the government suggests that these are issues that could be clarified by expert witnesses the defense once again refers the Court to the testimony of the bank's attorney Harry Stumpf. He was an expert in securities law and attempted to explain to the jury how a certificate of deposit can be encumbered as between Rush and the bank, yet be unencumbered as between the bank and the Insurance Commissioner to whom the bank had represented the certificate was being held in safe keeping. The Court could readily appreciate how the Insurance Commissioner could "prime" the bank as regards the C.D. and yet the bank would still be protected as between it and Mr. Rush. Yet anyone reading the testimony of Mr. Stumpf would quickly recognize that it is a cruel fiction to believe that the jury had any ability to understand those distinctions. The same judge who declined to allow the defense to waive the jury, commented as to how "muddy" the waters had gotten,[1] while the prosecutor commented that he was getting ready to throw more "dirt" in those waters. Tr. 1212.

Likewise is the testimony regarding statutory accounting. If the writ is granted the court will be able to see from

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[1] Other instances in which the Court complains about the case being confusing can be found throughout the record. E.G.Tr. 451; 874-877; 1208.

the transcript that the government called Mr. Walter Mann and established that he was the statutory accountant for Presidential and all of the entries he made were in accordance with the standards set forth by the National Association of Insurance Commissioners. Yet when the prosecutors cross-examined Mr. Rush on entries in Presidential's financial statements, which the government deemed to be inaccurate, they reacted with incredulity when he explained that he was not able to understand the reports because the entries were made under principles of statutory accounting with which he was not familiar. TR. 1050-1051. The government confronted him with the fact that he had taken accounting in college thereby implying to the jury that he was not being truthful. Tr. 1139-1140. Once again the court would be in a position to understand that the statutory accounting principles differed basically from regular accounting and the distinction being made by Mr. Rush was reasonable. There is no way that a jury of lay persons could be expected to understand those differences.

C. *Did The Trial Court Err In Failing To Dismiss The Indictment For Violation Of Rule 7(c) Of the Federal Rules Of Criminal Procedure Requiring That It Be Plain, Concise And Definite, And Did The Appellate Court Err In Upholding That Ruling?*

As noted in the introduction this Court has never directly visited the issue of the requirements under Rule 7(c) of the Federal Rules of Criminal Procedure that an indictment be a plain, concise, definite written statement. This court and the appellate courts have tended to merge the requirements under that rule with the constitutional standards. Yet in the lower courts petitioner conceded that the indictment was constitutionally valid; it simply was not plain and concise as required by statute. The appellate court once again sought to avoid the issue, this time on the basis of a procedural ground never urged by the government.

The appellate court stated:

> Rush cites no authority in support of his position, and he ignores the ample authority clarifying that a defendant's remedy in the face of a needlessly wordy indictment is a motion to strike surplusage under rule 7(d). See 1 Wright, *Federal Practice and Procedure,* §127, at 424-27.

United States v. Rush, 5th Cir. Opinion No. 93-3603, p.11.

Petitioner has no problem with the general proposition that if an indictment merely contains language which is surplus that a defendant's remedy is not to have the indictment dismissed, but rather to file a motion to strike the surplusage pursuant to the provisions of Rule 7(d) of the Federal Rules of Criminal Procedure. However, that was not the situation in the present case. Indeed, the Fifth Circuit Court of Appeals in its opinion specifically addressed the distinction when it noted:

> Rush's counsel explained at oral argument that he did not move to strike the unnecessary language because he could not identify any specific language that could be deleted while still leaving a viable indictment. *Ibid.*

After noting the defendant's position the court of appeals did not even analyze it, much less explain why it was incorrect.

A review of the indictment will disclose that it does not lend itself to being corrected by simply deleting portions of it that are not needed. It is flawed throughout and the problems are woven into the very fabric of the document. If all of the offensive argumentive portions were deleted that would certainly make the indictment more concise, but it would no longer be definite. By definition what is surplus is extra, not needed. Webster's New World Dictionary, 2nd Ed., defines surplusage as "irrelevant or superflous words or matter." Black's Law Dictionary defines surplusage in pleadings as "allegations of matter wholly foreign and impertinent to the cause...any allegation without which the pleading would yet be adequate." The Court will see from a review of the

indictment that it does not have the type extra or surplus language that could be deleted and still leave the pleadings adequate. What the prosecution did in the instant case was to allege the scheme in such a lengthy manner as to violate the concise requirement of Rule 7(c), but not lend itself to correction under Rule 7(d).

The appellate court denied the defendant Rush's motion to dismiss the indictment under Rule 7(c) because he "...cites no authority in support of his position...." *Ibid.*. While it is true that appellant found no case law supporting his position it is equally correct that he found no case law opposing it. The courts have simply never examined the problem. Indeed this Court in the cases of *United States v. Debrow,* 346 U.S. 375, 74 S.Ct. 113 (1953) and *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038 (1961) addressed the requirements under Rule 7(c) solely from the point of view of whether the indictments in question sufficiently apprised the defendant of what he must be prepared to meet at trial and to protect himself in the event of a plea of former acquittal or conviction. Both of those decisions cite as authority previous cases dealing with the constitutional requirements. It will be found that the appellate court decisions have handled Rule 7(c) the same way. E.g. *United States v. Rosi,* 27 F.3d 409 (9th Cir. 1994); *United States v. Shirk,* 981 F.2d 1382 (3rd Cir. 1992); *United States v. Olatunsi,* 872 F.2d 1161 (3rd Cir. 1989); *United States v. Silverman,* 745 F.2d 1386 (11th Cir. 1984); *United States v. Webb,* 747 F.2d 278 (5th Cir. 1984); *United States v. Chaney,* 964 F.2d 437 (5th Cir. 1992); *United States v. Edrington,* 726 F.2d 1029 (5th Cir. 1984) and *United States v. Gordon,* 780 F.2d 1165 (5th Cir. 1986).

No courts have sought to analyze the axiomatic proposition that Congress can legislate more stringent requirements for an indictment than those mandated by the Constitution. That is precisely what Rule 7(c) attempted to do when it required that an indictment be concise. The trial court declined to dismiss the indictment citing lack of appellate guidance. When the defendant Rush brought the issue before the court of appeals it denied relief in part because the appellant was supposedly unable to offer any authority in support of

his position. However, petitioner suggests that when he is able to cite a specific codal article, such as Rule 7(c), and can further demonstrate a problem which is addressed by that rule that that is ample "authority" to at least justify an analysis of the problem.

The district court clearly identified the mischief that is sought to be corrected in this writ application.

> The government creates difficulty when it seeks to recast the traditional form of indictment from a vehicle for stating the offense into a vehicle for arguing its case. The indictment will be read to the jury at trial and will be available for study (and presumably studied) by the jury during deliberations. Thus, the jury will carry into the jury room the government's version of the case -- in effect, the government's written oral argument in support of the alleged individual criminal acts. Pretermitting that a defendant does not have the same opportunity, it would seem such arguments are more properly left for trial.
>
> The Court notes with concern that such narratives have become common practice and apparently have not been discouraged by the appellate courts. This Court, however, articulates its concern about such narratives because they can, on occasion, confuse the jury and provide the government an unfair advantage during trial deliberations. Vol. III, pp. 815-816.

The trial judge was correct in his observations and it appeared from the ruling that the only reason for not dismissing the indictment was the court's belief that there was no legal authority for doing so. As previously noted Rule 7(c) covers exactly the situation that was troubling the trial judge. It is clear from the Appendix to Forms for Rule 7 that the type of indictments currently being employed by the government are not permissible. The most recent editions of the Federal Rules of Criminal Procedure do not still contain the appendix, but the reporter's note shows that they were abrogated not because they were no longer applicable but

rather because their content was well known to the Justice Department and the courts, and accordingly it served no useful purpose to continue to publish them as an appendix to the rule. Copies are attached as part of petitioner's appendix for the Court's ready reference.

They disclose the vast differences between what was envisioned and required by Rule 7(c) and what the government is routinely using in its current indictments. This is an illegal and prejudicial trend that should not be tolerated by this Court. The government started with a fact situation that would baffle a law professor and then chose to allege those facts in a complex and argumentative indictment, interwoven with the suggestion that the Louisiana Insurance Commissioner was bribed, but no specific allegation or charge[2]. Such indictments are prohibited under Rule 7(c) and if there were ever a situation in which the violation of the rule constituted reversible error it is in the present case.

The government in its response to the court of appeals tried to portray itself as being impaled on the horns of a dilemma because if its indictments are not detailed enough the defendant is not sufficiently informed of the charges against him, and cannot adequately object at the time of trial; on the other hand if it details the alleged offense it is accused of being too lengthy. No such dilemma exists.

The requirements under Rule 7(c) that an indictment be plain, concise and definite fit perfectly with the provisions of Rule 7(f) which provide for the defendant's right to receive by way of bill of particulars the specific information which he needs to adequately prepare his defense and object at trial. On the other hand a bill of particulars is not read to the jury and the jurors do not get to take it with them during their deliberations. Hence, that would obviate the problem which the district court found regarding the indictment in the

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[2] The government well knew that Presidential's insolvency was understood by the Insurance Commissioner's office and it was nevertheless allowed to operate. To get around this problem it undermined the defendant's position by suggesting, but not charging, bribery of the Commissioner.

present case containing over 25% argument and editorialization.

In support of its position the government quoted with great flourish the following language, "The indictment is prolix, but that is not fatal." The problem with that quote is that it is from the case of *United States v. Olmstead,* 5 F.2d 712, 715 (W.D. Wash 1925) that predates by over twenty years the enactment of the Federal Rules of Criminal Procedure which require that an indictment be concise. The defense once again respectfully calls the court's attention to the attached Appendix of Forms and particularly Form no. 3 which is a sample form indictment for mail fraud. It will be seen that the redactors of the Rules not only put in the requirement that an indictment be concise, but they also specifically attached forms demonstrating what was envisioned by that requirement. The Court will see that that sample mail fraud indictment relates to stock fraud regarding a gold mine. It was confected in two short paragraph. There is no doubt but that the particulars of such an offense could be expanded to consume 12 pages, as did the allegations in Count 1 of the instant case. The only problem then would be that it would not be concise and would be in violation of the law. That is precisely the problem with the indictment brought against the defendant Rush, and that is why it should have been dismissed.

In that regard, petitioner asks the Court to view this problem in context with the jury waiver issue. Confusion abounded in the district court.[3] If the defendant was not going to be allowed to waive the jury at very least he should have been spared from the over length, argumentive indictment with which he was confronted. Such indictments have insidiously creeped into the federal judicial system almost without notice. The government blithely responds that complex crimes require complex indictments. That really is not so, but no court has taken the time to closely scrutinize that bromide. The press release/editorial/closing argument/indict-

[3] Even in his jury instructions the trial judge kept saying how confusing the issues were. Tr. 1659, 1670.

ments are extremely prejudicial and specifically prohibited by Rule 7(c). Experienced trial judges such as George Arceneaux have watched their encroachment, and in this case he had the courage to speak out against what was happening. While he did not dismiss the indictment, he did specifically address his disappointment in the lack of appellate court guidance on the issue. The Fifth Circuit side stepped the issue. This is an important rule that deserves this Court's close scrutiny.

CONCLUSION

Petitioner recognizes that few requests for review are granted by the Court and hardly any at the urging of individual criminal defendants. Yet there are instances where it is the criminal defense bar which is in the best position to bring to the Court's attention troubling developments that otherwise might go unnoticed. While both of the issues presented in this application are serious and have wide ranging implications regarding the search for justice no drastic remedies are being sought. Certainly no malefactor is likely to escape conviction by opting for a judge trial. Yet in the limited circumstances when a defendant should be afforded that choice it is quite likely that the innocent accused would be properly protected by the trial judge. Likewise, if the Court enforces Rule 7(c) to require that criminal charges be concise, and that elaboration on the charges be accomplished by a bill of particulars as envisioned by the Code, no harm will be done to legitimate prosecutions. Yet the harm inherent in the complex argumentative indictments will be eliminated.

Respectfully submitted,

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